

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ADP COLLISION ESTIMATING SERVICES, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1983	:	
through November 30, 1986.	:	

Petitioner, ADP Collision Estimating Services, Inc., One ADP Boulevard, Roseland, New Jersey 07068, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 and the Tax Law for the period March 1, 1983 through November 30, 1986 (File No. 804973).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on January 12, 1989 at 10:00 A.M., with all briefs submitted by December 29, 1989. Petitioner appeared by Arnold B. Panzer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether petitioner's furnishing of collision damage estimates to insurance companies is the provision of information services subject to the tax imposed by section 1105(c)(1) of the Tax Law.

II. Whether the management reports furnished to an insurance company based upon statistical information on estimates prepared from data furnished by the employees of that company are excluded from tax under section 1105(c)(1) as information which is personal or individual in nature.

III. Whether petitioner can be held responsible for its failure to have collected tax on sales to its New York customers under the facts and circumstances of this case.

FINDINGS OF FACT

At all times herein relevant, petitioner, ADP Collision Estimating Services, Inc. (hereinafter "ADP"), was a foreign corporation principally engaged in providing a data processing service marketed to the public under the name "Audatex."

Audatex is a data processing service specifically designed to automatically generate appraisals or estimates, estimating the cost involved in repairing the collision damage sustained by a particular motor vehicle, based upon information furnished by customers.

The principal customers for the appraisals/estimates generated by Audatex are automobile insurance companies, which use the appraisal/estimates to determine the amount that they will offer to pay toward the repair of a vehicle insured under one of their policies. Audatex is also used by a number of vendors engaged in the business of repairing collision damage for the purpose of furnishing estimates for repair work to prospective customers, their insurers, or both. Typically, this group would include body shops, dealerships and independent advisory services.

The process of producing an estimate or appraisal of collision damage sustained by a particular vehicle includes a physical inspection of the vehicle in order to determine the extent of damage and the parts required to be replaced, repaired, and refinished in order to restore the vehicle to its prior condition. Persons hired by the insurance company to perform this function may be variously referred to as "estimators," "appraisers" or "adjusters".

After collecting the information concerning the nature of the damage sustained, an appraiser must ascertain the cost of any replacement parts, calculate the total time required to make each necessary replacement and/or repair to the vehicle, calculate labor time attributable to included operations and eliminate or adjust overlapping repair steps. Then the adjusted labor time for each category of labor must be totalled and multiplied by an hourly rate for the specific type of labor. Additionally, the cost of all replacement parts must be added together and combined with total labor cost and with the final allowance made for any betterment, policy deductible, or applicable sales tax on parts and labor.

Historically, the cost of replacement parts was found in publications containing current prices charged by the vehicle manufacturer such as Motor Crash Estimating Guide, published by the Hearst Corporation and the Mitchell Guide. As alluded to above, the replacement prices reflected in these manuals are based upon information periodically furnished by manufacturers.

The manuals referred to above do not provide information concerning the prices charged for similar parts, if any, sold by independent auto part manufacturers also referred to as "economy parts" or "after market parts".

In order to enable the adjustor or repair shop to identify the part in question, the manuals also provide a sketch or drawing of each available part. The adjustor uses the manual by first turning to the section covering the model and year of the vehicle in question. Utilizing these drawings, he then identifies the name of each part required to be replaced, noting the manufacturer's price and stock number listed adjacent thereto.

The manuals also list an estimate of labor time required for the installation of each such part, as well as the estimated time required for painting, refinishing, and other repairs. Such times are generally rounded off to the nearest tenth of an hour. The data concerning estimated time is supplied by the manufacturer.

In computing the total time to be allowed for installing replacement parts, it is necessary for the appraiser to eliminate from the total of the replacement times shown in the manual the time allowed for each replacement part whose removal and installation have already been taken into account in computing the estimated labor time allowed for the installation of one or more of the other parts required to be replaced or removed in connection with the repair of the vehicle in question. The body of an automobile is typically constructed in such a manner that the replacement of most of its parts will of necessity require the removal of one or more other parts or assemblies, regardless of whether such other parts or assemblies themselves have sustained any damage. Thus, the time allowed in the manual for the replacement of any particular part will also make allowance for the time required to remove and reinstall any and all of the other parts whose removal is required in order to replace the part in question. If one or more of the

parts required to be replaced in connection with the repair of a particular vehicle are parts whose removal and reinstallation are included in the time allowed in the manual for the installation of another replacement part (an "included operation"), the appraiser's failure to eliminate the replacement times for such parts would substantially overestimate the actual time required to install all necessary replacement parts.

The manuals generally caution the user to make whatever adjustments for included operations as may be appropriate. The manuals provide a guide to estimating which the appraiser uses to identify each operation for which allowance has been made in determining the estimated labor times listed therein. Consequently, the adjustment for included operations must be made by the appraiser on the basis of his accumulated knowledge and experience from training and the use of the manual.

The proper computation of estimated labor time also requires that a downward adjustment be made for operations involving so-called "overlap". Operations in which there is overlap are those in which part of the work required to be done in order to accomplish one task is also required to do another, and reduces the total time which would otherwise be required to do either separately. Overlap occurs in connection with the replacement of parts, where another part or group of parts must be removed in order to remove or replace either of two adjacent parts. Overlap also occurs in connection with refinishing or repainting, where windows must be covered, paint mixed, sprayers assembled, etc.

The amount of the deduction to be made with respect to overlapping operations is largely a matter of judgment, based on the field appraiser's knowledge and experience, but there are generally accepted rules of thumb which are frequently used. Overlap labor information is generally included at the beginning of each subgroup within a chapter of the manuals. Where overlap information is not provided, appropriate allowances are negotiated after the on-the-spot evaluation.

Another variable which must be considered is the different rates for labor involved in repairing automobile collision damage. Such rates fall into four classifications: (1) sheet metal

or exterior body (2) frame or work relating to the steel frame which supports both the engine and the body (3) electrical or mechanical and (4) refinishing. Therefore it is important that each repair task be properly assigned to the appropriate category in order that the proper labor rate is charged. The rates charged for various types of labor involved in repairing collision damage may vary substantially depending upon the location of the repair facilities in which the vehicle in question is to be repaired. In the cases of appraisals prepared for insurance companies, the rates allowed for labor are established for various regions of the country by the customer's own management.

Because the process of inspecting the extent of the damage sustained by a particular vehicle is functionally separate from the process of actually calculating the estimate, the two steps may be performed by different persons.

Specifically with regard to the Audatex system, as long as the proper form has been accurately filled out and properly prepared for computer entry, the calculation of the estimate of the cost of repairing the damage may be computed with equal or greater accuracy by Audatex than by the person who made the actual inspection. It is noted that the Audatex system is no more accurate than the information it is provided by the inspector or appraiser. When the precise nature of the damage sustained and the hourly rates to be allowed for labor are provided to Audatex, the system can be used as a tool to generate an error free estimate of the cost of repairs which will take into account adjustments for overlap and included operations. It is further noted that the inspection of damage, the providing of said information including hourly rates to Audatex and the calculation of the replacement parts all comprise what is referred to as an appraisal or estimate, for without any one of the steps no appraisal or estimate would be possible.

Each Audatex subscriber is provided with a series of worksheets prepared by Audatex for most models of domestic and foreign automobiles likely to be encountered by a subscriber. Insurance adjustors utilizing the Audatex system carry a selection of Audatex worksheets and standard manuals with them when performing on-site inspections.

Each worksheet contains a scale drawing of each exterior part of the automobile in question. The drawings are similar to those contained in the manuals but are organized and arranged in a manner as to indicate the relative positions in the assembled automobile. Each part shown in the drawings is connected by a straight line to the particular Audatex "guide" number listed in the column on the side of the page. Adjacent to each guide number is a series of columns in which the person performing the inspection is to make an appropriate entry to indicate the nature of the repair required with respect to the part represented by the guide number.

In the first column alongside the identification number is printed the symbol "E". Circling the "E" in the row indicates that the part in question must be replaced, and that the replacement will be made using a part manufactured by the same company that produced the vehicle in question, known as the "original equipment manufacturer" or "OEM". Other symbols may be circled to indicate that the part is to be refinished or repaired. Additional codes and notations may be inserted in blank spaces to indicate that parts other than those produced by the manufacturer of the vehicle should be used, or to indicate that there has been prior damage.

Besides marking off the columns provided for the parts to be replaced or repaired, the adjustor or repair shop must also provide Audatex with the hourly rate to be used in computing the cost of all necessary labor. As in the case of an appraisal prepared manually, the customer requesting the Audatex report must supply the hourly rate to be allowed for each hour of labor time.

When completed, the entries in the worksheet provide a complete description of the damage and the work necessary to restore the automobile to its prior condition. This document is not itself an estimate or appraisal. However, it does provide sufficient information for a complete estimate to be computed on the basis thereof by Audatex. It is noted that a manual appraisal could also be computed on the basis of the worksheet by a trained appraiser who understood the relevant Audatex codes used by the preparer.

In addition to entering the foregoing information, the field appraiser is required to

include various information relating to the ownership, license, and registration of the vehicle in question, as well as data relating to the nature of the accident, and information concerning the time and circumstances of the inspection itself.

In order for Audatex to compute the appraisal, the information must be transmitted to the Audatex computer. This is done orally by calling an Audatex operator and reciting all of the relevant information indicated on the worksheet over the telephone. More typically, the information is conveyed over one or more terminals located in the customers' offices. After connecting with Audatex, the data entered on the worksheet is typed on the keyboard of the terminal in response to a preprogrammed series of questions. The information so entered is transmitted to the Audatex computer center in Ann Arbor, Michigan over a network of local and interstate telephone lines. Once the computer has received all of the relevant information, it will proceed to process data, and produce a complete appraisal as to the cost of repairing the vehicle in question. This appraisal is transmitted to the customer's terminal to be printed, using the same or similar network of local and interstate telephone lines.

In preparing the estimates or appraisals, Audatex automatically supplies the relevant manufacturer's price for replacement parts, as well as the estimated labor times needed to install a particular part. This information is derived from a data base containing the prices of replacement parts sold by the vehicle's manufacturer and the estimated labor time required to install such parts. The data supplied by Audatex relating to a manufacturer's replacement part price and estimated labor time is essentially identical to that provided in the manuals.

Audatex does not supply any data of the type which can not be found in the manuals. For example, if the field appraiser believes that a replacement part is available which is manufactured by someone other than the manufacturer of the vehicle, he must enter the price of that part on the worksheet for use by Audatex following the symbol "ec", i.e., economy part. Where parts such as glass are sold at a discount from the OEM price, the field appraiser may simply note the percentage of discount and Audatex will automatically compute the cost by reference to the OEM price.

Field appraisers are not required to make any entries with regard to included operations or overlap. Audatex has been programmed to automatically recognize situations in which overlap exists and to automatically make appropriate adjustments therefor. Similarly, the Audatex software is able to automatically determine whether the replacement of a particular part is an operation including the time allowed to replace another. Audatex handles included operations by omitting any labor time with respect to such operations. The fact that the replacement of a particular part is an operation which must be performed in order to replace another is indicated on the face of the Audatex appraisal by the fact that no labor time is allowed or included with respect to the installation of that part. It is noted that the manuals do provide the adjustor with the knowledge of what is included and what is not included in a given labor operation. Therefore, the estimator can determine included operations and overlap and could presumably overrule any adjustment made by the Audatex computer.

Audatex also automatically sorts the total labor performed into one of the four categories of sheet metal, mechanical, electrical, or refinishing prior to multiplying the total adjusted labor time for each by the hourly rate applicable thereto.

A separate total is computed for the cost of the replacement parts. Included in the total is the cost of any OEM parts automatically entered by Audatex, as well as the price of any economy parts supplied by the customer. Sales tax, if indicated to be due on the worksheet, will be automatically computed for parts purchased at the rate specified by the customer. The same is true with respect to any sales tax on the cost of labor.

The total costs of parts and labor are added together to indicate the total estimated cost of repairing the vehicle in question. The amount of any applicable deductible under the policy will then be subtracted from this figure to indicate the amount which the insurance company is responsible for paying for the repaired vehicle. The deductible will not be subtracted unless such information is transmitted to Audatex along with the balance of the data.

The information furnished to Audatex, and the appraisals prepared on the basis thereof, are regarded by Audatex as confidential, and are not furnished to any person without the express

consent of the customer for whom the appraisal was prepared.

Audatex is designed to produce complete appraisals involving the damage sustained by an automobile. The term "complete appraisal" means a report containing a numerical figure deduced from substantial information provided by an inspector which has its source in a common database. The database in which this information is stored for use by Audatex computers cannot be directly accessed by customers, regardless of whether a terminal device is used in the process of transmitting the collision data on which the Audatex appraisal is based. Audatex furnishes replacement part prices and estimated labor times only in the context of furnishing a completed appraisal report relating to the particular automobile. Audatex is neither intended nor designed to be used simply as an alternative to looking up information concerning replacement parts or estimated labor times in manuals.

A witness at hearing, Mr. James Winter, a claims superintendent at the State Farm Insurance Company, stated that Audatex

"is just another tool to do the job. It does not allow you to do the job. Any estimator we hire is trained, has to be capable of making an independent and written estimate, inclusive of eliminating overlaps and included operations. That is part of the training.

* * *

We have people who have been with us for 15 months that are still not on the system."

In addition to producing collision damage appraisals, Audatex also makes available a management report to insurance companies. These reports contain statistics drawn from past appraisals performed on the basis of data submitted by the client's own adjustors. The management reports are used by the client to compare the relative efficiency of its various adjustors, including such factors as the extent to which the use of economy and discount parts are being specified in their appraisals.

The Division of Taxation offered to exempt from taxation sales of said management reports to the extent that petitioner could substantiate said sales to its customers. However, no such substantiation was ever submitted by petitioner.

In or about October of 1985, the Division of Taxation began a field audit of petitioner at its corporate offices in Hayward, California. After inspecting sales tax returns, related worksheets for sales tax returns, sales journals, and sales invoices, it was determined that petitioner's books and records were consistent with its policy of collecting tax on its terminal rentals and printed reports while treating insurance estimates and information services as nontaxable. After extended negotiations with petitioner, the Division of Taxation determined that the insurance appraisals or reports which were generated from a common data bank were not private and personal in nature and therefore were held as taxable services.

Petitioner's sales tax returns were verified through August of 1987, with no errors being found. It was noted that petitioner had failed to file a return for August 1986, and when petitioner was notified of the missing return it immediately submitted the delinquent return with payment.

Therefore, the Division took reported gross sales of petitioner, giving credit for reported taxable sales, and issued an assessment holding the alleged exempt sales as additional taxable sales and computing the additional tax due from said figure.

The effective tax rate of .075 was chosen as a statewide average since petitioner did business in many jurisdictions in the State of New York and offered no evidence with regard to where the purported exempt sales took place. This statewide average of .075 was applied to the purported exempt sales to arrive at additional tax due.

During the two years that this audit was open, there were various meetings between petitioner, represented by its director of corporate taxes, Thomas DeLorenzo, and the Division, represented by the auditor, Sheldon Lippman, and James Nuttal. The only issue discussed by the parties was whether the collision damage estimates produced by petitioner were taxable. Petitioner also requested time to apply for an advisory opinion, which it subsequently chose not pursue. Once it became apparent that no resolution would be reached, petitioner requested that an assessment be issued in order that it might be able to pursue relief through its administrative remedies. At this time the Division of Taxation assessed tax against all claimed nontaxable

sales thought to be comprised of receipts for the collision damage estimates sold to petitioner's customers. The rate of tax applied was .075, an agreed-upon average of the state and local tax rates used for the purpose of expediting the appeal process. By using the average, the Division of Taxation was relieved of the responsibility of having to perform an in-depth audit of petitioner's records which would have prolonged the audit for an undetermined amount of time, a result not desired by petitioner.

Petitioner and the Division executed consents extending the period of limitation for assessment of sales and use taxes for the periods between March 1, 1983 and November 30, 1984, allowing the Division until December 20, 1987 to assess said periods.

Subsequently, on December 16, 1985, the Division issued to ADP a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth a total tax due of \$35,556.56 and interest of \$11,404.83 for a total amount due of \$46,961.39 for the period September 1, 1982 through February 28, 1983. Additionally, on October 1, 1987, the Division issued to ADP a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth tax due in the sum of \$33,123.75 with interest of \$1,715.26 for a total amount due of \$34,839.01 for the period September 1, 1986 through November 30, 1986. Finally, on October 1, 1987, the Division issued ADP a Notice of Determination and Demand for Payment of Sales and Use Tax Due for the period March 1, 1983 through August 31, 1986, setting forth total tax due of \$328,823.29 and interest of \$79,155.52 for a total amount due of \$407,978.81.

At hearing, Mr. Walter Hoffman from the Division of Taxation testified that he participated in the drafting of the regulations at 20 NYCRR 527.3(b)(2) and that "Example 2" contained therein was meant to apply to body shops and other establishments which performed "complete" appraisals, i.e., all steps from inspection through calculation, not merely the calculation.

To the extent that they were not irrelevant or conclusory in nature, petitioner's proposed findings of fact have been incorporated herein.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides that:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due will be determined by the Tax Commission from such information as may be available."

A review of petitioner's books and records, including sales tax returns, related worksheets for sales tax returns, sale journals and sales invoices, revealed that petitioner was reporting taxable sales for its terminal rentals and miscellaneous sales made to customers. However, the bulk of petitioner's sales were treated as nontaxable and considered to be exempt as the sale of computerized collision repair estimating reports.

The Division disagreed with petitioner's legal interpretation of the reports as exempt from tax and assessed tax on all of its nontaxable sales as reported on its returns at an average rate of .075.

Although petitioner's counsel argues that the use of a .075 tax rate was not agreed to by petitioner, credible evidence to the contrary exists in the record and is accepted herein.

Given the facts adduced in the record, it is well settled that negotiations took place between the parties for approximately two years during which time the central issue was the taxability of the collision damage reports. Petitioner requested time to acquire an audit advisory opinion, but later withdrew that request. At that juncture, the case had been open for almost two years and petitioner requested an expeditious resolution of the case and desired to proceed through the administrative process. For this reason, the testimony at hearing with regard to the selection of .075 as an agreed-upon statewide percentage rate is credible and augments the evidence that petitioner desired an expeditious resolution of the case, rather than having the Division of Taxation undertake the time-consuming task of inspecting the voluminous records to ascertain the actual rates for each sale.

For all the reasons set forth, the audit methodology is sustained.

B. Tax Law § 1105(c)(1) imposes a tax on:

"(c) The receipts from every sale, except for resale, of the following services:

(1) the furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news."

Petitioner relies on the exclusion within Tax Law 1105(c)(1) which excludes from tax information "which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons...." However, it is concluded herein that petitioner's service is not within the parameters of the exclusion set forth above.

The regulation at 20 NYCRR 527.3(b)(2) provides as follows:

"The sales tax does not apply to the receipts from the sale of information which is personal or individual in nature and which is not or may not be substantially incorporated into reports furnished to other persons by the person who has collected, compiled or analyzed such information.

* * *

Example 2: Automobile insurance damage appraisals performed for insurance companies or individual reports, the fees for which are not subject to sales tax."

It is concluded that the reports issued by petitioner do not reflect an entire appraisal or estimate but only a numerical figure deduced from substantial information provided by the appraiser/inspector/estimator which has its source in a common database.

Example 2 contained in 20 NYCRR 527.3(b)(2) is applicable only to damage appraisals performed by body shops or other persons or establishments which performed the entire appraisal process from inspection through calculation of damages. Therefore, petitioner's contention that example 2 should apply to the instant case is rejected.¹

C. Petitioner contends that this case should be governed by Automatic Data Processing, Inc. (State Tax Commission, May 8, 1985). Therein, the reports in question concerned orders

¹One of the drafters of that regulation, Mr. Walter Hoffman, testified to this intent of the example at the hearing.

made and transactions performed pertaining to stocks in particular customers' portfolios.

Although the petitioner in that case purchased prices of securities from an independent service and applied values obtained therefrom to the securities in its clients' portfolios, the Commission found that such did not change the essential nature of such reports as personal and individual in nature. The Commission found that there was no requirement within the statute or regulations that all information in each report must be used only in that particular report.

However, in Rich Products Corp. v. Chu (132 AD2d 175, 521 NYS2d 865, lv denied 72 NY2d 802), which is closer to the facts in this case, the petitioner utilized the services of a computer information service which accepted raw data with regard to petitioner's products and produced from said data reports which aided marketing strategies and research. Rich Products provided the product it wished to have reported on and the competing products to which it wanted comparisons made, the specific geographical market area to be surveyed, the units of measurement to be used for comparison, which was quite detailed, and also the relevant time frame and four-week periods for which the survey was to be made. In that case, it

was conceded by the Division that each report was customized to fit the specific informational requests of the client and that the variables from which the client could select as to product, market location, time frame and units of measurement and equivalencies made it a virtual mathematical impossibility that all or part of a report to one client would be duplicated in a report to any other client. The court therein confirmed the Tax Commission's decision that upheld a sales tax assessment against the petitioner for use of the services finding that the information in a report failed to meet either of the two necessary elements of the exclusion. The court said:

"We agree with the Tax Commission that the fact that no two reports to different customers are likely to be the same and that such reports are customized in some respects to respond to the needs of the particular client is not dispositive of entitlement to the exclusion, particularly where, as here, the information contained therein is derived from a single data repository which itself is not confidential and is widely accessible. To rule otherwise would be inconsistent with our holdings that the exclusion did not apply to information furnished in response to the specific client requests (1) for particular marketing data in Matter of Towne-Oller & Assoc.

v. State Tax Commn., 120 AD2d 873; (2) for accident and traffic violation records of specific automobile insurance applicants in Allstate Ins. Co. v. Tax Commn. of State of New York, 115 AD2d 831, 834, affd 67 NY2d 999; and (3) for the specific export-import information sought by individual subscribers in Matter of Twin Coast Newspapers v. State Tax Commission, 101 AD2d 977, appeal dismissed 64 NY2d 874. In none of the foregoing cases were the reports actually or likely to be identical to reports furnished others." (Rich Products Corp. v. Chu, supra, 521 NYS2d at 867.)

It is noteworthy that the procedure followed by an insurance company or other customer of ADP involves a substantial amount of work by the customer prior to any service being rendered. The customer's employee must make a physical observation of the vehicle, and fill out an ADP worksheet giving specifics of the damage and damaged parts of the vehicle, indicating whether a part is to be repaired or replaced and if a repair, the estimate of the time required for the repair. If a part is to be replaced, the appraiser must indicate whether it will be replaced with a new part, an economy, or after-market part or a salvaged part. Additionally, adjustments for prior repair of the part or area must be noted. After all this information is provided to ADP, ADP supplies information to its customers by way of a report which provides information from its database, all of which is contained in the crash manuals. Except for the speed with which the information can be processed, the quickness with which the information is updated, and the programming for included operations and overlaps which could be overruled by the judgment of an appraiser, the report is nothing more than an application of materials which are available in the crash manuals. For this reason, it is held that the information in the reports is the same information available to the general public in various crash manuals. The information is not privileged and it is the same information contained in the crash manuals which are used when collision damage estimates are prepared manually.

Finally, it is clear that the Audatex system is merely another tool to produce an appraisal report. Testifying on behalf of petitioner, Mr. Winter of State Farm Insurance stated as much (see Finding of Fact "30").

This testimony is supportive of the argument by the Division that the reports generated through ADP's Audatex system do not represent automobile damage appraisals performed for insurance companies. The damage reports produced by ADP are simply one service used by

highly-trained insurance company appraisers in the preparation of damage appraisals.

Based on the facts recited, it is held that Rich Products (supra) is controlling herein, and that petitioner has not demonstrated its entitlement to the exclusion provided in 1105(c)(1).

D. The issue of whether management reports furnished to an insurance company based upon statistical information in estimates prepared from data furnished by the employees of that company should be excluded from tax under section 1105(c)(1) as information personal or individual in nature was never developed in the record. Although they were described by one of petitioner's employees at hearing, no further evidence with regard to receipts for said reports or substantiation for a modification of the assessment based upon their nontaxability was entered into evidence. Additionally, in a letter to the Administrative Law Judge dated October 17, 1989, petitioner's representative appears to abandon the issue of taxability of the management reports after failing to obtain a stipulation with regard to same and chose instead to challenge the propriety of the audit methodology used to determine the deficiency herein. Since the propriety of that methodology has been sustained, the issue of the management reports is rendered moot.

E. Tax Law § 1132(a) provides that "[e]very person required to collect the tax shall collect the tax from the customer when collecting the price...to which it applies." The tax is paid to the person required to collect it as trustee for and on account of the state.

Tax Law § 1131(1) defines those persons required to collect tax. It includes every vendor of tangible personal property or services, which presumably includes petitioner herein. Tax Law § 1133(a) provides that every person required to collect any tax imposed by this article [28] shall be personally liable for the tax imposed, collected or required to be collected under this article. (See also, 20 NYCRR 526.11.)

Petitioner's contention that this liability as set forth in the sections above is in the nature of a penalty is in error. Further, its argument that its failure to collect tax was without fault because of its interpretation of the law is tantamount to an argument that ignorance of the law is permissible. It is noted that petitioner herein was not assessed a penalty, only minimum interest

and therefore it would appear that the Division of Taxation acknowledged petitioner's misinterpretation of the nature of its services pursuant to Tax Law § 1105(b).

Finally, petitioner's reliance on Matter of Lesly Advertising Associates v. State Tax Commission (130 AD2d 932) is misplaced. In the instant action petitioner's reliance upon example 2 in the regulation at 20 NYCRR 527.3(b) was unwarranted, since it has been determined that the reports issued by petitioner herein are not what can be defined as an automobile damage appraisal.

F. The petition of ADP Collision Estimating Services, Inc. is denied and the notices of determination and demands for payment of sales and use taxes due dated December 16, 1985 and October 1, 1987 are hereby sustained, together with such additional interest as may be lawfully owing.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE